

March 13, 2002

Sky Woodruff, Assistant City Attorney
City of Oakley
Meyers, Nave, Riback, Silver & Wilson
777 Davis Street, Suite 300
San Leandro, CA 94577

**Re: Your Request for Advice
Our File No. A-01-157**

Dear Mr. Woodruff:

This letter is in response to your request for advice on behalf of Councilmember Carol Rios and Commissioners Gina Rozenski and Charlene Souza, regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please bear in mind that nothing in this letter should be construed to evaluate any conduct that may have already taken place. In addition, this letter is based on the facts as they have been presented to us. The Commission does not act as a finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. May Carol Rios, a member of the city council of Oakley, participate in decisions regarding adoption of the city's general plan in light of her real property interests in the city?
2. May Gina Rozenski, a planning commissioner for the City of Oakley, participate in decisions regarding adoption of the city's general plan in light of her real property interests in the city?
3. May Charlene Souza, a planning commissioner for the City of Oakley, participate in decisions regarding adoption of the city's general plan in light of her real property interests in the city?
4. If these officials have a conflict of interest in participating in these decisions, can segmentation be applied to allow their participation in decisions in which they do not have a conflict of interest regarding the general plan for the City of Oakley?

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

CONCLUSIONS

1-3. Carol Rios, Gina Rozenski, and Charlene Souza would have a conflict of interest in decisions regarding the city's general plan at this stage of the process because their property is directly involved in the governmental decision.

4. If the city divides the general plan area into geographical areas, Ms. Rios, Ms. Rozenski, and Ms. Souza may participate in decisions covering geographical areas where they have no disqualifying interests if the decisions will not affect the decisions for which they are disqualified.

FACTS

The City of Oakley is in the process of adopting its own general plan, as required by Government Code Section 65103. Prior to adoption by the city council, Oakley's planning commission must consider the general plan and make a recommendation to the council.

The California Environmental Quality Act ("CEQA") requires that all projects that may have an impact on the environment must be subject to an environmental review. The purpose of that review is to analyze and inform decision-makers and the public about potential environmental impact. The city expects that an environmental impact report (EIR) will be needed for the adoption of the general plan. The city council has instructed its general plan consultant to work with the public and decision-makers to agree on a preferred alternative for the general plan. The preferred alternative will then be analyzed in the EIR or other appropriate CEQA document. The planning commission will make a recommendation to the council regarding the certification of the CEQA document. The city council may then adopt the CEQA document. After the CEQA document is adopted, the city will consider and adopt the final general plan. Although the city council will probably try to agree on all aspects of the general plan before agreeing on the preferred alternative, the city council will have the legal right to modify the preferred alternative prior to adoption of the final general plan.

The city attorney's office has analyzed the financial interests of all of the members of the city council and planning commission. You believe that Councilmember Carol Rios, Planning Commissioner Gina Rozenski, and Planning Commissioner Charlene Souza are the only members of either body who have financial interests that could be affected by the adoption of the general plan in a way that differs from the public generally.

According to the city's community development department, the city has 8,139 total parcels developed with a residence, which comprise 3,962 total acres. Using those numbers, the average lot size for a single-family residence is 0.48 acres. That number is misleading, however, because of the existence of some extremely large lots with a single residence. Removing the 15 largest parcels from the calculation results in 8,124 total parcels, which comprise 2,799 acres and have an average lot size of 0.34 acres. Removing the 25 largest parcels from the calculation results in 8,114 total parcels, which include 2,675 total acres with an average size of 0.33 acres. As discussed in more detail below, each of the city officials on whose behalf advice is sought has a single-family residence located on a parcel larger than the average for the city, regardless of

which of the preceding calculations is used. Thus, the city attorney's office is concerned about the possibility that each of these city officials has a disqualifying conflict of interest with regard to participation in the general plan adoption process because of their respective financial interests.²

Councilmember Rios

Carol Rios has served on the city council since incorporation on July 1, 1999. She and her husband currently own two adjacent parcels of real property in the city, located at 11 Kay Court and 35 Kay Court. The former is approximately 1.5 gross acres, the latter 1.29 acres. The Rios family has a residence at 35 Kay Court. The land use designation for their parcels is Single Family Residential-Medium Density (3.0 to 4.9 units/net acre).

Commissioner Rozenski

Gina Rozenski has served on the planning commission since March 1, 2000. She and her husband are currently the trustees and beneficiaries of a trust containing a parcel of real property located at 6155 Sellers Avenue. The lot is approximately one acre. The Rozenski's residence is located on the parcel. The land use designation for their parcels is AL-Agricultural Lands.

Commissioner Souza

Charlene Souza has served on the planning commission since March 1, 2000. She and her husband own a parcel of real property located at 119 Loren Lane. The lot is approximately 1.25 acres. The Souza's residence is located on the parcel. The land use designation for their parcels is SV-Single Family Very Low Density.

The City proposes the following segmentation process. When members of the council and commission discuss proposed land uses in Area 1, Councilmember Rios will not participate. The same procedure is proposed for Area 2 and Commissioner Rozenski, and Area 3 and Commissioner Souza. The planning commission will then hold at least one public hearing on the general plan intended to result in a recommendation to the city council. During the hearing(s), issues in Areas 2 and 3 will be discussed first, in turn, especially proposed land uses, and Commissioners Rozenski and Souza will not participate in each, respectively. They will both participate in discussions on the rest of the proposed general plan alternatives, and they will vote

² We have not applied the "public generally" exception found in regulation 18707.9 based on your assessment that it would not apply under the facts in this case.

on the recommendation to approve the general plan and EIR. A written recommendation will then be transmitted to the city council (Gov. Code § 65354), which will hold at least one public hearing prior to acting on the commission's recommendation (Gov. Code § 65355). Issues involving Area 1, particularly the recommended land uses will be discussed first at the hearing, and Councilmember Rios will not participate in those discussions. She will participate in the remainder of the discussions and will vote on the general plan and EIR.

Until the opening of official public hearings by the planning commission and city council, joint meetings of the two bodies will essentially be an opportunity for staff to present information and to receive direction about what should be included in the preferred land use alternative and the proposed general plan. However, no final decisions will be made before the opening of public hearings. After receiving all of the information presented at their respective public hearings, the planning commission will make a recommendation about whether to approve the proposed general plan or whether to modify it, and the city council will decide whether to approve the general plan or modify it. The city council will also decide whether to certify the EIR. Thus, the general plan adoption process, in general, involves numerous opportunities for preliminary input on the document by the public, the planning commission, and the city council, as well as final action on the document after formal public hearings.

Turning to the potential application of the "public generally" exception, you provide the additional information below.

In its initial letter requesting advice, the city indicated that currently 8,139 total parcels in the city are developed with a residence; it has since learned, based on more recent census data that that number is actually 7,790. The average lot size for a single-family residence is 0.48 acres. That number is misleading, however, because of the existence of some extremely large lots with a single residence. Removing the 15 largest from the calculation results in 8,124 total parcels, which comprise 2,799 acres and have an average lot size of 0.34 acres. Removing the 25 largest parcels from the calculation results in 8,114 total parcels, which include 2,675 total acres with an average size of 0.33 acres. Councilmember Rios's property consists of two adjacent parcels totaling 2.79 acres; Commissioner Rozenski has a single one-acre parcel; and Commissioner Souza's property is approximately 1.25 acres.

ANALYSIS

Conflict of Interest

Section 87100 prohibits any public official from making, participating in making or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted a standard, eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Reg. 18700, subd. (b)(1)-(8).)

Steps One and Two - Is the individual a "public official" subject to the Act's conflict-of-interest rules and, if she is a "public official," is she making, participating in making, or influencing a governmental decision?

The Act's conflict-of-interest provisions apply to "public officials." (§§ 87100, 87103; Reg. 18700, subd. (b)(1).) City council members, as well as planning commissioners, are public officials. (§§ 82048, 82041.) Moreover, the council member and commissioners wish to make and participate in decisions concerning the city's general plan, clearly a governmental decision.

Step Three - Identifying Economic Interests

The third step is to identify the economic interests of the official that the decision might affect. (Reg. 18700, subd. (b)(3).) Section 87103 enumerates six different types of economic interests that may give rise to a conflict of interest. Pertinent to your request, section 87103 provides that a public official has a disqualifying financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on "[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more." (§ 87103, subd. (b).)

Councilmember Rios and Commissioner Souza own and live in residential properties within the City of Oakley. Commissioner Rozenski is currently a trustee and beneficiary of a trust containing real property on which she has her residence. Section 82033 defines an interest in real property as including a beneficial interest: "Interests in real property of an individual includes a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater."

While you have not indicated the value of their respective interests in their residences, we will assume, for purposes of this letter, that each is worth \$2,000 or more. Additionally, we are assuming that Commissioner Rozenski has a beneficial interest in the trust of 10-percent or greater. As such, they each have an economic interest in their residences for purposes of section 87103. You have not identified any other economic interests that might give rise to a conflict of interest.

Step Four - Direct or Indirect Involvement

The next step is to determine whether the economic interests will be involved directly or indirectly in the decision. (Reg. 18700, subd. (b)(4).) An official's real property is directly involved in a decision if the property is the subject of the decision, or if any part of the property is located within 500 feet of property that is the subject of the decision. (Reg. 18704.2, subd. (a).)

The council member and commissioners have an economic interest in real property that is within the general plan area. (See Reg. 18704.2, subd. (a)(4).) Thus, their real property interests are directly involved in this decision.

Steps Five and Six – Materiality and Foreseeability

Once a public official identifies his or her relevant economic interests, the official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on any of those economic interests. This determination takes two steps. First, the official must ascertain the applicable materiality standard, (Reg. 18700, subd. (b)(5), Reg. 18705, et seq.) and then determine whether it is reasonably foreseeable that the standard will be met. (Reg. 18700, subd. (b)(6).)

An effect is considered "reasonably foreseeable" if the effect is "substantially likely." (Reg. 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made depends on the specific facts surrounding the decision. A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

For real property directly involved in a decision, regulation 18705.2 provides that the financial effect of the decision on the real property is *presumed* to be material. (Reg. 18705.2, subd. (a)(1).) However, the official may rebut this presumption with proof that there is absolutely no reasonably foreseeable financial effect on his or her real property interest as a result of the decision. Since you have indicated in your request for advice that these officials each have an interest in their property that could be affected by the adoption of the general plan, we presume for purposes of this letter that there is a foreseeable material financial effect on the economic interests of each of the public officials.

Accordingly, the council member and commissioners have a conflict of interest in the decision regarding the city's general plan.

Segmentation of Disqualifying Governmental Decisions

You have specifically proposed a segmentation plan. Under certain circumstances, a public official disqualified from one decision may participate in other related decisions provided that the official's participation does not affect the decision in which he or she has a conflict of interest. (*In re Owen* (1976) 2 FPPC Ops. 77.) However, certain decisions are too interrelated to be considered separately, and in that event, a public official's conflict on one decision will be disqualifying for the other.

Decisions are inextricably interrelated where, among other things, one decision is a necessary condition precedent or condition subsequent for another. Thus, a public official would have to disqualify himself or herself if the result of one decision would effectively determine or nullify the result of another. For example, in a decision to select one of two autopark sites, a decision to select one of the sites is essentially a decision against the other autopark site. (*Boogaard* Advice Letter, No. I-90-347.) Similarly, decisions regarding one aspect of a general plan may be so interrelated to other decisions that they may not be bifurcated, because one decision will effectively decide the other. (With respect to segmentation of decisions, *see e.g.*, *Merkuloff* Advice Letter, No. I-90-542; *Lindgren* Advice Letter, No. A-99-313; *Sweeney* Advice

Letter, No. A-89-639; *Stone* Advice Letter, No. A-92-133a; *Ball* Advice Letter, No. A-98-124; and *Ennis* Advice Letter, No. A-94-203.)

Assuming that a decision can be logically segregated from other related decisions, the public body must then procedurally segregate the decision prior to allowing the public official with a related conflict to participate in the decision-making process. This entails three steps:

- (1) the decisions in which the public official has a disqualifying financial interest should be segregated from the other decisions on the public body's agenda;
- (2) the decisions from which the public official is disqualified should be considered first, and a final decision should be reached by the public body without the disqualified official's participation in any way; and
- (3) once a decision has been reached on the issues in which the official is disqualified, the disqualified official may participate in the deliberations regarding the other related issues so long as his or her participation does not result in a reopening of the previous issues or in any other way affect the decisions concerning the previous issues in which the public official was disqualified from participation.

In your request for advice you presented a detailed analysis of how the general plan decisions might be segregated in a way that would allow Ms. Rios, Ms. Rozenski, and Ms. Souza to participate in decisions in which they do not have a conflict of interest. Specifically, you have presented a plan to divide the city, and thus the general plan decisions, into geographical "areas." Because of the possible interrelationship of land use designation and zoning areas, the council member and planning commissioners may participate in decisions regarding areas where they have no real property holdings only if the decision on any one component will not have a reasonably foreseeable material financial effect upon their interests. (*Huffaker* Advice Letter, No. A-86-343.) If the decision will not have such an effect, they may participate if the procedure outlined above is followed by their respective agencies.

In addition to participating in other aspects of the general plan update, we have advised that officials may vote on the final adoption of the plan. This is the case even though the final general plan update includes the item from which the official was disqualified, provided that the decision does not reopen or in any way alter the decision from which the official was disqualified. (*Cook* Advice Letter, No. A- 83-163.)

Steps 7 and 8: Exceptions

We have not gone on to discuss the "public generally" exception because you note that the officials in question will not be affected in substantially the same manner as a significant segment of the public. The Commission does not act as the finder of fact in providing advice. Additionally, you have not asked about, and we have not addressed, legally required participation.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: C. Scott Tocher
Counsel, Legal Division

CST:jg
I:\AdviceLtrs\01-157